

2011

# Deference to the Executive in the United States after 9/11: Congress, the Courts, and the Office of Legal Counsel

Eric A. Posner

Follow this and additional works at: [https://chicagounbound.uchicago.edu/public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

---

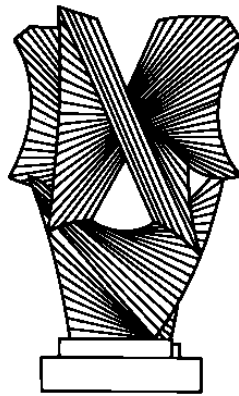
## Recommended Citation

Eric Posner, "Deference to the Executive in the United States after 9/11: Congress, the Courts, and the Office of Legal Counsel" (University of Chicago Public Law & Legal Theory Working Paper No. 363, 2011).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 363



## DEFERENCE TO THE EXECUTIVE IN THE UNITED STATES AFTER 9/11: CONGRESS, THE COURTS AND THE OFFICE OF LEGAL COUNSEL

*Eric A. Posner*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

September 2011

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series:  
<http://www.law.uchicago.edu/academics/publiclaw/index.html>  
and The Social Science Research Network Electronic Paper Collection.

Deference to the Executive in the United States after 9/11:  
Congress, the Courts, and the Office of Legal Counsel

Eric A. Posner<sup>1</sup>

September 22, 2011

Abstract. The deference thesis is that Congress and the judiciary should defer to the executive's policy judgments during national emergencies. A recent criticism of the deference theory draws on the analogy of the emergency room medical protocol to argue that emergencies call for rule-bound constraint of the executive rather than deference to it. However, this criticism rests on a misunderstanding of the tradeoff between rules and standards. Some scholars who have despaired of congressional or judicial constraint of the executive, but believe that some sort of constraint is desirable, have suggested that the executive's own legal adviser, the Office of Legal Counsel, could provide such a constraint. In fact, OLC cannot plausibly be considered a constraint on the executive; its function is the opposite—to expand rather than to contract executive power.

According to the “deference thesis,” legislatures, courts, and other government institutions should defer to the executive's policy decisions during national security emergencies.<sup>2</sup> In this paper, I will address two criticisms of the deference thesis. The first argument, which has been developed most powerfully by Stephen Holmes, is that rules dominate standards at moments of crisis.<sup>3</sup> An executive that is unconstrained, that is, not bound by rules, will make worse policy choices than an executive that is bound by rules. This type of argument is usually made in the context of urging legislatures and courts to constrain the executive during emergencies.<sup>4</sup> Some commentators, however, doubt whether it is possible for legislatures and courts to constrain the executive during emergencies. These doubts have led to a second argument, which is that the executive should be bound by institutions within the executive branch such as (in the United States) the Office of Legal Counsel,<sup>5</sup> or through the construction of new institutions that review the executive branch's actions.<sup>6</sup> Both arguments criticize the deference thesis but propose different solutions. The first proposes that Congress and the judiciary give the executive less deference; the second proposes that officials within the executive branch give the president less deference. Thus, we can distinguish external constraints on the executive and internal constraints on the president.

---

<sup>1</sup> Kirkland & Ellis Professor, University of Chicago Law School. Thanks to Curt Bradley, Jack Goldsmith, Aziz Huq, Trevor Morrison, and Adrian Vermeule for very helpful comments; to Ellie Norton for research assistance; and to the Microsoft Fund and the Russell Baker Scholars Fund at the University of Chicago Law School for financial assistance.

<sup>2</sup> See Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 15 (2007).

<sup>3</sup> Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 Cal. L. Rev. 301 (2009).

<sup>4</sup> It is, however, a more general argument; however, for present purposes, I will consider it in the context of external constraints.

<sup>5</sup> See Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2007).

<sup>6</sup> See Bruce Ackerman, *The Decline and Fall of the American Republic* (2010).

I criticize both these arguments. The external-constraints argument gets the normal analysis backwards: rules are better for routine, recurring situations. While some emergencies are, in fact, routine, the type of emergency that calls for deference is not. The internal-constraints argument, as normally presented, makes the fatal assumption that the president can be bound by his own agents against his own perceived interest, and relies on other questionable premises about the structure of government in the United States.

## I. The Deference Thesis

The deference thesis states that during emergencies the legislature and judiciary should defer to the executive. It assumes that the executive is controlled by the president, but to the extent that the president could be bound by agents within the executive, the deference thesis also holds that those agents should follow the president's orders, not the other way around. In normal times, the three branches of government share power. The president needs legislative approval in order to take action. For example, if the executive believes that a new, dangerous drug has become available, but possession of the drug is not yet illegal, the executive may not act on its own to detain and prosecute those who deal and use the drug. It must first ask the legislature to enact a statute that outlaws the drug. The executive also depends on the legislature for financial appropriations and other forms of support. Once the executive obtains legislative authorization, it still faces constraints from the courts. If the executive arrests dealers and seeks to imprison them, they must first obtain the approval of courts. The courts will ensure that the executive does not go beyond the bounds of the new law; does not violate other earlier enacted laws that have not been superseded by the new law; and does not violate the Constitution.

In emergencies, the executive will often contemplate actions that do not have clear legislative authority, and that may be constitutionally dubious. For example, after 9/11 the U.S. government engaged in immigration sweeps, detained people without charges, used coercive interrogation, and engaged in warrantless wiretapping of American citizens. Many if not all of these actions would have been considered violations of the law and the U.S. Constitution if they had been undertaken on 9/10 against normal criminal suspects. After 9/11, both the legislature and the courts gave the executive some deference. The legislature later gave explicit authority to the executive, which it initially lacked; the courts did not block actions that they would have blocked during normal times. Neither body was entirely passive.<sup>7</sup> Congress objected to coercive interrogation and did not give the executive all the authorities that it requested. After a slow start, the courts also resisted some of the claims made by the executive. There is some dispute about whether this resistance was meaningful and caused the executive to change policy or merely reacted to the same stimuli that caused the executive independently to moderate certain policies,<sup>8</sup> but in any event no one disputes that the courts gave the executive a nearly free pass over at least the first five to seven years of the conflict with Al Qaeda.

The deference thesis, then, can be strong-form or weak-form. This ambiguity has had unfortunate consequences for debates about post-9/11 legal policies. Virtually no one believes that the courts should impose exactly the same restrictions on the executive during an emergency

---

<sup>7</sup> See Jack L. Goldsmith, *Power and Constraint: The Presidency in an Age of Endless War* (manuscript).

<sup>8</sup> See, e.g., Aziz Huq, *What Good is Habeas?*, 26 Const. Comm. 385, 402-05 (2010).

as during normal times. Indeed, doctrine itself instructs courts to balance the security value of a course of action and its cost to civil liberties, implying that certain actions may be legally justified to counter high-stakes threats but not to counter low-stakes threats. Nor does anyone believe that the executive should be completely unconstrained.

The debate can be best understood in the context of the U.S. government's post-9/11 policies. Defenders of these policies frequently invoked the deference thesis—not so much as a way of justifying any particular policy, but as a way of insisting that the executive should be given the benefit of the doubt, at least in the short term. The deference thesis rests on basic intuitions about institutional competence: that the executive can act more decisively and with greater secrecy than Congress or the courts because it is a hierarchical body and commands forces that are trained and experienced in countering security threats. The other branches lack expertise, and although they may have good ideas from time to time, and are free to volunteer them, the ability of the executive to respond to security threats would be unacceptably hampered if Congress and the courts had the power to block it to any significant degree. Secrecy is an important part of the argument. Policymaking depends on information, and information during emergencies must often be kept secret. Congress and the courts are by nature and tradition open bodies; if they were to act in secret, their value would be diminished. Meanwhile, the argument continues, the fear of an out-of-control executive who would engage in abuses unless it was constrained by the other branches is exaggerated. The president has strong electoral and other political incentives to act in the public interest (at least, in the United States). For if the executive can conceal various “inputs” into counterterrorism policy, it cannot conceal the “output”—the existence, or not, of terrorist attacks that kill civilians.

Thus, it was possible for defenders of the Bush administration's counterterrorism policies to express discomfort with certain policy choices, while arguing nonetheless that Congress and the courts should not try to block executive policymaking for the duration of the emergency—at least not as a matter of presumption. Critics of the Bush administration argued that deference was not warranted—or at least not more than a limited amount of deference was warranted, although again these subtleties were often lost in the debate—for a variety of reasons. I now turn to these arguments.

## II. External Constraints: The Protocol Analogy

### A. Medical Protocols

In an article published a few years ago, Stephen Holmes uses the arresting image of the medical protocol as a device for criticizing the deference thesis—or, more broadly, the thesis that the executive should be “unconstrained” during emergencies. Holmes describes his own experience in an emergency room, where his daughter had been brought with a serious injury:

At a crucial moment, two nurses rushed into her hospital room to prepare for a transfusion. One clutched a plastic pouch of blood and the other held aloft my daughter's medical chart. The first recited the words on the bag, “Type A blood,” and the other read aloud from the file, “Alexa Holmes, Type A blood.” They then proceeded, following a prepared and carefully rehearsed script to switch props and roles, the first nurse reading

from the dossier, “Alexa Holmes, Type A blood,” and the second reading from the bag, “Type A blood.”<sup>9</sup>

To the layman, the repetitive actions of the nurses seem senseless: *why are they repeating themselves when the patient may die unless she receives the blood transfusion immediately?* Surely, the nurses should depart from the script rather than follow it in a time of extreme medical urgency. Yet the protocol makes good sense. Experience has taught medical personnel that basic errors—the transfusion of the wrong blood—occur frequently, and that they can be avoided through the use of simple protocols. Although following the protocol uses valuable time, in practice the increased risk to the patient as a result of the loss of time is less than the risk caused by the errors that protocols are designed to prevent.

The larger and more striking point of the example is that, even during emergencies, when the stakes are high and time is of the essence, agents should follow rules rather than improvise. In this way, agents should be constrained. This argument has potentially radical implications. Recall that the conventional objection to deference is that the risk of executive abuse exceeds the benefits of giving the executive a free hand to counter Al Qaeda. Holmes argues—although at times he hedges<sup>10</sup>—that in fact the benefits of giving him a free hand are zero: a constrained executive, like a constrained medical technician, is more effective than an unconstrained executive. If the benefits of lack of constraint are zero, then the deference thesis is clearly wrong: constraints *both* prevent executive abuses such as violations of civil liberties *and* ensure that counterterrorism policy is most effective.

## B. Rules and Standards

The arresting medical protocol example helps clarify the tradeoffs involved, but for all that it is merely an illustration of the familiar rules/standards tradeoff which has been a staple of the legal literature for time immemorial. A rule is a norm that directs the decisionmaker to ignore some relevant policy considerations when deciding on a course of action; a standard is a norm that directs the decisionmaker to take into account all relevant policy considerations when deciding on a course of action. The familiar example is the speed limit. A speed limit tells the driver that he does not face a legal sanction if he drives below a certain speed, say, 60 miles per hour, and that he does face a legal sanction if he exceeds the speed limit. A standard—for example, “drive carefully”—tells the driver that he does not face a legal sanction if he drives carefully, but that he does if he drives carelessly. The standard, unlike the rule, directs the driver to take into account all relevant considerations—the weather, traffic congestion, his own skill and experience, the responsiveness of his car, and so on—when deciding how to drive.

A driver who drives at 65 on a clear day on an empty, straight road, who is skilled and experienced, poses little threat to anyone, and most people would regard his driving as careful, so that under the standard he could not be held liable, while under a rule he would be. Meanwhile, a driver who drives 60 miles per hour on a congested, dangerous road, at night, in bad weather, who is inexperienced, would probably be regarded as careless, so that he would be held liable under a standard but not under the rule. It is in the nature of standards that we cannot be sure that

---

<sup>9</sup> Holmes, *supra* note \_ at 301-02.

<sup>10</sup> See, e.g., Holmes, *supra* note \_ at 308.

he would be held liable; it depends on the biases, intuitions, and experiences of the legal decisionmaker. Thus, we say that applying standards involves high decision costs. And it is in the nature of rules that we can easily tell whether the driver would be held liable or not, but only because the legal decisionmaker is forced to ignore relevant moral and policy considerations that otherwise complicate evaluation. Rules are under- and overinclusive; by design, they cause error.

These considerations lead to a basic rules-standards prescription.<sup>11</sup> Use rules to govern recurrent behavior, and use standards to govern unusual behavior. Experience teaches us that if drivers obey certain rules (such as speed limits), the risk of accident is greatly reduced, while judicious choice of (sometimes complex) rules ensures that error costs are low. When legislatures enact new rules, they can invest a great deal of time and effort determining the optimal rules, because the cost of the rules are then spread out over many instances of the behavior that the legislatures seek to regulate. And yet rules frustrate us because there always seems to be some new, unanticipated case where the application of rules leads to an injustice. The speed limit rule should not apply to the parent who rushes a badly injured child to the hospital. And there are many cases where rules can too easily be gamed. Tax rules, no matter how intricate, can be exploited: lawyers set up tax shelters that evade the purpose of the rules. Congress reacted to this problem initially by creating ever more complex rules, but eventually trumped them with a standard that prohibited bad faith evasion of the tax laws.

The legal landscape is a complex mix of rules and standards, which often overlap. Drivers must obey both traffic rules like the speed limit and traffic standards like laws against reckless driving and tort norms against negligent driving. Indeed, one can think of traffic norms as complex rules-with-standards—where there are apparently bright-line rules (drive under 60 miles per hour) that are subject to muddy standards (unless there is an emergency).

Medical protocols are just one more example of a choice along the rules-standards continuum. The nurses Holmes describe follow a protocol that ensures that they do not use the wrong blood in a transfusion. Doctors are instructed to clear the windpipe before staunching the wound.<sup>12</sup> And so on. These protocols, like the speed limit, reflect generalizations from past medical experience. Delaying the blood transfusion is less risky than permitting only one nurse to check the blood type. Letting the blood flow from the wound is less risky than leaving the windpipe blocked. In the absence of protocols, medical practitioners may misjudge the situation, or panic, or allow themselves to be distracted by irrelevant factors (the goriness of the wound calls out for attention while the blocked windpipe is hidden). It is important to see that these rules, like the speed limit, are mere generalizations, and in individual cases the generalizations might be wrong. The patient dies because of the delay before the transfusion. Yet we instruct medical practitioners to follow the rules because otherwise they are likely to make worse errors.

And yet as we saw above, legal rules inherently produce error costs, and it turns out that medical protocols do as well. In fact, medical practitioners are permitted to violate protocols. The reasons are obvious. Consider Holmes' insistence that the rule "wash your hands prior to performing a procedure" is unalterable, written in stone.<sup>13</sup> Clearly, that cannot be the case.

---

<sup>11</sup> See, e.g., Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557 (1992).

<sup>12</sup> Holmes, *supra* note \_ at 304.

<sup>13</sup> Holmes, *supra* note \_ at 309.

Suppose that, in the midst of an emergency involving a patient with a serious trauma, the staff is informed that the tap water is tainted; or it is discovered that a patient has a rare allergy to the only soap that is available in the emergency room; or, for that matter, the emergency room runs out of a soap. Common sense (which is just the application of a standard—help the patient at minimal risk to him and oneself) will tell the doctors and nurses to deviate from the protocols when they clearly interfere with medical necessity. If they did not, they would be sued, and rightly so. The protocols, like many rules, turn out to be presumptions, which may be overcome by the press of events. That is why medical professionals are so highly trained; if one could really treat patients by following algorithms, one would not need doctors who have vast training and experience that supplies them with judgment and the ability to improvise.<sup>14</sup>

In sum, medical protocols, like rules, provide a valuable service by simplifying the decisionmaking process at times of high stress, but, like rules, they unavoidably produce wrong results if they are not applied sensitively. Usually, when the stakes are high, rules and protocols create presumptions, but the decisionmaker is free to violate the presumption if circumstances suggest that the presumption is based on factual assumption that turn out not to be true in the particular setting in which the decisionmaker finds himself.

### C. Rules and Standards during Emergencies

I now turn to the bulk of Holmes' argument, and make the following points. Holmes is right to identify confusion about the nature of emergency; and it is useful to distinguish a rule-development stage, which often but not always takes place prior to the emergency, and a rule-application stage, which takes place during the emergency. Holmes argues that at the emergency stage, rule application should be controlled by protocol, so the executive does not need (much) discretion; while at the pre-emergency stage, rule development does not need to be rushed and secret, so the executive can collaborate with Congress. The first problem with this argument is that, in fact, during the emergency one can follow protocols rather than exercise discretion only if the emergency is the same as previous emergencies. This was not the case for 9/11, though it may be the case for other security threats (albeit with the proviso that protocols are really just presumptions and it requires judgment to follow them). The second problem is that the rule-development stage cannot always take place during normal times; in fact, 9/11 required not only an immediate response to the newly discovered threat but the development of new rules under the shadow of that threat. Those rules needed to be developed quickly and (for the most part) secretly, and these exigencies limited the ability of Congress to contribute. A final point is that Holmes ignores an important dimension of the problem: the difference between agents, who in theory can merely follow rules and protocols, and principals, who cannot. The Bush administration did in fact recognize the value of protocols and used them frequently; it just did not apply them to itself.

---

<sup>14</sup> This problem is famous from labor relations. Workers who seek to pressure employers without going out on strike (which in certain cases may be illegal) have frequently adopted the strategy of "work-to-rule," where they follow the rules or protocols of their job in a literal-minded way rather than use them as presumptions. The result is that they become extremely unproductive while maintaining deniability, though no one is fooled.



## 1. Two Concepts of Emergency

Holmes makes a valuable point, often neglected in the literature, that there are two distinct phases for addressing emergencies—what I will call the stage of rule development and the stage of rule application. As we will see, the two stages can run together, but conceptually they are distinct. The rule application stage comes when the patient is on the gurney. The doctors follow the protocols in the course of helping the patient. The rule development stage occurs earlier. Someone must decide what the protocols should be. Someone had to invent the rule that two nurses double check the blood type, and that doctors should unblock the windpipe before staunching wounds—just as the legislature must determine the speed limit before drivers comply with it and police enforce it.

We might use the word “emergency” to refer to the time of rule-application. As Holmes points out, however, for the medical professionals, what seems like an emergency to a layperson is not an emergency at all. They just apply the protocols that have been drilled into them, no different from assembly-line workers. If this is what emergency means, then it is hard to understand defenders of the deference thesis, who argue that the executive must be unconstrained during emergencies. If doctors are constrained, why not executives?

But if we refer instead to the time of rule-development, reliance on the idea of emergency seems even less appropriate. The doctors who develop emergency room protocols do not do so under the pressure of time; they can do so at leisure. They can also do so in a large body, so as to take advantage of the perspectives of many different people, and in public, so that all stakeholders have a say. And so can the executive, the argument goes. When the executive determines the rules that will govern the response during a terrorist attack, it does so in advance. And it can, indeed should, do so in consultation with Congress and subject to judicial constraint.

The upshot is that executive deference is not necessary. During rule development, there is no emergency, and so the executive, Congress, and the courts can collaborate in developing appropriate rules that will govern during emergencies. They can do so openly, deliberately, and slowly, with full respect for constitutional norms. During rule application, there is an emergency, but the executive can merely follow the rules or protocols that were developed during the rule-development stage. Thus, in the rule application phase, executive discretion is also unnecessary. It follows that deference to the executive is also unnecessary. During rule development, Congress has no reason to defer to the executive. During rule application, courts also have no reason to defer to the executive, but should instead insist that the executive comply with the rules.

## 2. Rule Application

Let us consider the stages in reverse order. We already have addressed some of the problems with Holmes’ argument from protocols. Rules are seldom as bright-line as they first appear. They often turn out to be presumptions which are themselves subject to standards (drive under the speed limit unless there is an emergency). It is true that security threats, like medical emergencies, often fall into patterns and can be addressed in partially rule-governed fashion. Thus, when a gunman takes a hostage, the police follow certain rules: first clearing the area, then

making contact with the gunman, etc. Some officers will be given very simple rule-governed tasks (don't let anyone cross this line). But the rules quickly give out. Every hostage-taker is different, and the most highly trained police officers will be given a great deal of discretion to deal with the hostage taker, and to make the crucial decision when to use force. But even these types of threats are simple compared to the scenario that opened up on 9/11. The government knew virtually nothing about the nature of the threat. It did not know how many more members of Al Qaeda were in the United States; what their plans might be; what resources were at their disposal; how much support they had among American Muslims; what their motives were; and much else. Protocols were worthless because nothing like this had ever happened before. (The closest analogy seemed to be the absurdly irrelevant example of Pearl Harbor). The government could not follow rules; it had to improvise subject to a vague standard—protect the public while maintaining civil liberties to the extent possible. And improvise it did—instituting detentions, sweeps, profiling, surveillance, and many other policies on an unprecedented (in peacetime, if that was what it was) scale.<sup>15</sup>

For the rule-application stage, the deference thesis counsels Congress and the judiciary to (presumptively) defer. Congress simply cannot set about holding hearings, debating policy, and voting on laws in the midst of emergency. Either the problem will not be addressed, or Congress will end up voting on a bill that it has not written, debated, or even read.<sup>16</sup> For courts, too, the alternatives are unrealistic. If courts enforce rules developed for normal times, then they will interfere with the proper response to the terrorist threat, just as they would if they required the U.S. military to comply with the Fourth Amendment on the battlefield. Alternatively, the courts could insist on applying a standard, and halt executive actions that, in the courts' view, violated the standard I described above—protect the nation while maintaining civil liberties to the extent possible. But here the courts are at a significant disadvantage. They do not have information about the nature of the threat. They can demand it from the government but the government will not give it to them because it fears leaks (to say nothing of recalcitrance caused by rivalries among intelligence agencies). And judges are inexperienced in national security unlike the specialists in the executive branch.

None of this is to deny Holmes' basic point that protocols can be valuable. Indeed, the Bush administration was as protocol-happy as any other institution. Consider the protocols for interrogation which were disclosed in a leaked OLC memo:

In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. ... During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe

---

<sup>15</sup> But if Al Qaeda launched another attack on U.S. soil tomorrow, the argument for deference in that case would be weakened, because more is known about Al Qaeda today than ten years ago.

<sup>16</sup> As occurred with the TARP law. See Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the financial Meltdown of 2008*, 76 U. Chi. L. Rev. 1613 (2009).

unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated.<sup>17</sup>

So not even the Bush administration disagreed with Holmes' argument that lower-level officials faced with recurrent situations should be subject to protocols where they are appropriate. In this sense, Holmes' argument misses the mark entirely. The problem was not so much that protocols were not used; the problem, if it was a problem, was that they were developed, modified, and revised by the executive branch. This leads us to the question of rule development.

### 3. Rule Development

Recall that Holmes says that the argument that the executive can act more swiftly than Congress and the courts does not apply to the rule-development stage because the crisis is past even if the threat remains. But if we think back to 9/11, the problem was that crisis did not end on that day even though the immediate threat of violence did. It was reasonable to believe on 9/12 that other plots had been put into action, and violence would erupt at any moment. As the weeks and months past, these concerns faded but it also became clear that Al Qaeda had sympathizers even if not always members in the United States, and these people might strike at any time, possibly on their own, or volunteer for training that would later make them considerably more dangerous. The anthrax scare brought home the possibility that Al Qaeda could use even more deadly weapons than hijacked airplanes. Every day brought another revelation of a hole in border security. Thus, it was a matter of urgency to develop new rules that would address the threat.

The government maintained the confidentiality of a constant supply of intelligence, for fear of exposing sources and methods. Meanwhile, the government was already taking secret actions (many of which were later exposed), including surveillance of cell phone calls, tracking of monetary transfers, and infiltration of terrorist organizations. Optimal policy going forward necessarily depended on secrecy. Policy X, which might seem plausible given publicly available information, may turn out to be unnecessary, redundant, or even counterproductive in light of secret information about the activities of Al Qaeda or secret Policy Y. Thus, while Congress could no doubt give useful advice, it seems hard to believe that it could have contributed much to the development of counterterrorism tactics, any more than it can contribute to military tactics (where to invade, where to bomb) during a regular war.

A set of constitutional protocols normally applies to the making of policy and its embodiment in government action. The executive must act with, and through, Congress, and it must respect the courts; it cannot act by itself. But these rules apply to normal times, and the medical protocol analogy is of little use here. Medical protocols do not need to be secret because patients have no incentive to game them—unlike terrorists who benefit greatly from knowing the methods that the United States uses to spy on them, capture them, and interrogate them. And medical protocols are not based on secret information; they are based on widely available medical research. Thus, when medical researchers develop medical protocols at the rule

---

<sup>17</sup> Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. Legal Counsel, to John Rizzo, Acting Gen. Counsel, CIA, Re: Interrogation of al Qaeda Operative 3-4 (Aug. 1, 2002) (hereinafter Interrogation Memorandum), available at <http://s3.amazonaws.com/nytdocs/docs/151/151.pdf>.

development stage, they can do so publicly without undermining the purpose of developing the protocols in the first place.

By contrast, rules governing counterterrorism operations must be developed mostly in secret, and mostly on the basis of secret information. Hence the importance of keeping rule development as much as possible within the only branch that possesses the power to act against security threats. Those rules, of course, would constrain only lower-level executive agents, not the executive itself. There is an obvious reason for this; if the rules are wrong, they need to be corrected. It would similarly make little sense for doctors to develop emergency room protocols that could never be changed in the future as new technologies and new health problems rendered the old protocols worthless.

Holmes argues that the executive becomes subject to groupthink and other decisionmaking pathologies when it makes policy itself rather than with Congress and other agents. But the same point can be made about executive decisionmaking during regular wars, when the risk of groupthink (if it is a risk) is tolerated because of the need for secrecy. An argument could be made that secrecy is more important for real wars than for quasi-wars like the conflict with Al Qaeda, but it is not clear why this should be so.

If Congress and the judiciary cannot constrain the executive during emergencies because of the problem of secrecy, then perhaps this problem can be overcome by putting the source of constraint in the executive branch itself, where norms of secrecy prevail. That brings us to the Office of Legal Counsel.

### III. Internal Constraints: The Office of Legal Counsel

In the early years of the Bush administration, the Office of Legal Counsel, which is an office within the Department of Justice, issued a series of memoranda that argued that certain counterterrorism practices—including surveillance of U.S. citizens and coercive interrogation—did not violate the law. These memos were later leaked to the public and caused an outcry. In 2011, the head of the Office of Legal Counsel told President Obama that continued U.S. military presence in Libya would violate the War Powers Act. The president disregarded this advice, relying in part on contrary advice offered by other officials in the government.

These two events neatly encapsulate the dilemma for OLC, and indeed all the president's legal advisers. If OLC tries to block the president from acting in the way he sees fit, it takes the risk that he will disregard its advice and marginalize the institution. If OLC gives the president the advice that he wants to hear, it takes the risk that it will mislead him and fail to prepare him for adverse reactions from the courts, Congress, and the public.

Can OLC constrain the executive? That is the position taken by many scholars, most notably Jack Goldsmith.<sup>18</sup> The underlying idea here is that even if Congress and the courts

---

<sup>18</sup> Goldsmith, *The Terror Presidency*, *supra* note \_\_\_. In a review of Ackerman, *supra* note \_\_\_, Trevor Morrison defends OLC against Ackerman's claim that it can only be a rubber stamp, but it is not clear whether Morrison takes Goldsmith's view (that OLC can serve as an external check on the executive) or a view closer to the one advanced in

cannot constrain the executive, perhaps offices within the executive can. The opposite view, advanced by Bruce Ackerman, is that OLC is a rubber stamp.<sup>19</sup> I advocate a third view: OLC does not constrain the executive but enables him to accomplish goals that he would not otherwise be able to accomplish. It is more accurate to say that OLC enables than constrains.

#### A. Background on OLC

OLC is a small office in the Justice Department headed by an assistant U.S. Attorney General.<sup>20</sup> The OLC head is nominated by the president and confirmed by the Senate, and is formally a subordinate of the Attorney General. OLC is essentially an adviser to an adviser. The Attorney General's chief obligation is to give advice to the president; he typically relies on OLC to produce that advice. But he retains the authority to disagree and disregard it if he so chooses. In practice, OLC often gives advice directly to the president because the Attorney General has delegated to it much of his advice-giving role.

Most matters that come before OLC are routine. OLC provides legal analysis of bills, executive orders, and signing statements. OLC also plays an important role in resolving disputes among executive agencies over legal authority. In most of these cases, the president does not have any particular agenda, and so OLC can give honest advice without fear of retribution. In a number of significant cases, however, OLC is asked by the White House to evaluate a proposed action or policy that the president clearly seeks to pursue. For example, the president may seek to launch a military intervention, and asks OLC for legal authorization. In these cases, the White House may put pressure on OLC to rubber stamp the action.

#### B. OLC as a Constraint on the Executive

A number of scholars have argued that OLC can serve as an important constraint on executive power. I will argue that OLC cannot act as a constraint on executive power. Indeed, its only function is the opposite—as an “enabler” (as I will put it) or extender of executive power.

A president must choose a course of action. He goes to OLC for advice. Ideally, OLC will provide him good advice as to the *legality* of the course of action. It will not provide him political advice and other relevant types of advice. The president wants to maximize his political advantage,<sup>21</sup> and so he will follow OLC's advice only if the legal costs that OLC identifies are greater than the political benefits. On this theory, OLC will properly always give the president neutral advice, and the president will gratefully accept it although not necessarily follow it.

If the story ended here, then it would be hard to see what the controversy over OLC could be about. As an adviser, it possesses no ability to constrain the executive. It merely provides

---

this paper (that OLC serves as an enabler). See Trevor W. Morrison, Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation, 12 Harv. L. Rev. F. 62 (2011).

<sup>19</sup> See Ackerman, *supra* note \_\_\_. For similar skepticism, see Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2335-38 (2006).

<sup>20</sup> See Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448 (2010) (and citations therein).

<sup>21</sup> This assumption should be uncontroversial; if the president seeks to act lawfully, then institutional constraints are hardly necessary.

doctrinal analysis, in this way, if it does its job properly, merely supplying predictions as to how other legal actors will react to the president's proposed action. The executive can choose to ignore OLC's advice, and so OLC cannot serve as a "constraint" on executive power in any meaningful sense. Instead, it merely conveys to the president information about the constraints on executive power that are imposed from outside the executive branch.

However, there is an important twist that complicates the analysis. The president may choose to publicize OLC's opinions. Naturally, the president will be tempted to publicize only favorable opinions. When Congress<sup>22</sup> claims that a policy is illegal, the president can respond that his lawyers advised him that the policy is legal. This response at least partially deflects blame from the president. There are two reasons for this. First, the Senate consented to the appointment of these lawyers; thus, if the lawyers gave bad advice, the Senate is partly to blame, and so the blame must be shared. Second, OLC lawyers likely care about their future prospects in the legal profession, which will turn in part on their ability to avoid scandals and to render plausible legal advice; they may also seek to maintain the office's reputation. When OLC's opinions are not merely private advice, but are used to justify actions, then OLC takes on a quasi-judicial function. Presidents are not obliged to publicize OLC's opinions, but clearly they see an advantage to doing so, and they have in this way given OLC quasi-judicial status.

But if the president publicizes OLC opinions, he takes a risk. The risk is that OLC will publicly advise him that an action is illegal. If OLC approval helps deflect blame from the president, then OLC disapproval will tend to concentrate blame on the president who ignores its advice. Congress and the public will note that after all the president is ignoring the advice of lawyers that he appointed and thus presumably he trusts, and this can only make the president look bad. To avoid such blame, the president may refrain from engaging in a politically advantageous action. In this way, OLC may be able to prevent the president from taking an action that he would otherwise prefer. At a minimum, OLC raises the political cost of the action.

I have simplified greatly, but I believe that this basic logic has led some scholars to believe that OLC serves as a constraint on the president. But this is a mistake. OLC strengthens the president's hand in some cases and weakens them in others; but overall it extends his power—it serves as enabler, not constraint.

To see why, consider an example in which a president must choose an action that lies on a continuum. One might consider electronic surveillance. At one extreme, the president can engage in actions that are clearly lawful—for example, spying on criminal suspects after obtaining warrants from judges. At the other extreme, the president can engage in actions that are clearly unlawful—for example, spying on political opponents. OLC opinions will not affect Congress's or the public's reaction to either the obviously lawful or the obviously unlawful actions. But then there are middle cases. Consider a policy L, which is just barely legal, and a policy I, which is just barely illegal. The president would like to pursue policy L but fears that Congress and others will mistakenly believe that L is illegal. As a result, political opposition to L will be greater than it would be otherwise.

---

<sup>22</sup> And other relevant audiences, including courts, the press, and the public; for simplicity, I will generally refer to Congress.

In such a case, a favorable advisory opinion from a neutral legal body that has credibility with Congress will help the president. OLC's approval of L would cause political opposition (to the extent that it is based on the mistaken belief that L is unlawful) to melt away. Thus, OLC enables the president to engage in policy L, when without OLC's participation that might be impossible. True, OLC will not enable the president to engage in I, assuming OLC is neutral. And, indeed, OLC's negative reaction to I may stiffen Congress' resistance. However, the president will use OLC only because he believes that OLC will strengthen his hand on net.

It might be useful to make this point using a little jargon. In order for OLC to serve its ex ante function of enabling the president to avoid confrontations with Congress in difficult cases, it must be able to say "no" to him ex post for barely illegal actions as well as "yes" to him for barely legal actions. It is wrong to consider an ex post no as a form of constraint because, ex ante, it enables the president to act in half of the difficult cases. OLC does not impose any *independent* constraint on the president, that is, any constraint that is separate from the constraint imposed by Congress.

An analogy to contract law might be useful. People enter contracts because they enable them to do things ex ante by imposing constraints on them ex post. For example, a debtor can borrow money from a creditor only because a court will force the debtor to repay the money ex post. It would be strange to say that contract law imposes "constraints" on people because of ex post enforcement. In fact, contract law enables people to do things that they could not otherwise do—it extends their power. If it did not, people would not enter contracts.

A question naturally arises about OLC's incentives. I have assumed that OLC provides neutral advice—in the sense of trying to make accurate predictions as to how other agents like Congress and the courts would react to proposed actions. It is possible that OLC could be biased—either in favor of the president or against him. However, if OLC were biased against the president, he would stop asking it for advice (or would ask for its advice in private and then ignore it). This danger surely accounts for the fact that OLC jurisprudence is pro-executive.<sup>23</sup> But it would be just as dangerous for OLC to be excessively biased in favor of the president. If it were, it would mislead the president and lose its credibility with Congress, with the result that it could not help the president engage in L policies. So OLC must be neither excessively pro-president nor anti-president. If it can avoid these extremes, it will be an "enabler"; if it cannot, it will be ignored. In no circumstance could it be a "constraint."<sup>24</sup>

---

<sup>23</sup> See Morrison, *Stare Decisis*, supra note \_\_ at 1501.

<sup>24</sup> There is a second twist to the analysis. The president and OLC have developed a mechanism for limiting the downside of negative advice. That is the process under which OLC first gives the president legal advice orally and privately, and then memorializes it in writing only if it is favorable (or otherwise if the president consents). If this system worked perfectly, then OLC would enable the president to engage in all L policies without affecting his ability to engage in I policies. As a result of OLC advice, Congress will drop its opposition to L; while in the absence of OLC advice, Congress's opposition to I will remain moderate because of its uncertainty as to whether I is illegal. As a result of OLC's participation in executive branch decisionmaking, the political opposition to L drops to zero, while political opposition to I remains unchanged.

It would be wrong to exaggerate the significance of this mechanism. If OLC never publicly gave the executive negative advice, then it would lose its credibility. And if the executive offers no OLC defense for certain actions when it has done so in the past, Congress and others will naturally infer that OLC has privately given negative advice to the president. So for certain types of actions, Congress will expect an OLC opinion and draw a negative inference if none is forthcoming. See Morrison, *Constitutional Alarmism*, supra note \_\_ at 1732-33;

If the OLC cannot constrain the president on net, why have people claimed that OLC can constrain the president? What is the source of this mistake?

One possibility, which I have already noted, is that commentators might look only at one side of the problem. Scholars note that OLC may “prevent” the president from engaging in barely illegal actions without also acknowledging that it can do so only if at the same time it enables the president to engage in barely legal actions. This is simply a failure to look at the full picture.

For example, in *The Terror Presidency*, Goldsmith argues that President Bush abandoned a scheme of warrantless wiretapping without authorization from the FISA court because OLC declared the scheme illegal, and top Justice Department officials threatened to resign unless Bush heeded OLC’s advice.<sup>25</sup> This seems like a clear example of constraint. But it is important to look at the whole picture. If OLC had approved the scheme, and subsequently executive branch agents in the NSA had been prosecuted and punished by the courts, then OLC’s credibility as a supplier of legal advice would have been destroyed. For the president, this would have been a bad outcome. As I have argued, a credible OLC helps the president accomplish his agenda in “barely legal” cases. Without taking into account those cases where OLC advice helps the president’s agenda ex post as well as the cases where OLC advice hurts the president’s agenda ex post, one cannot make an overall judgment about OLC’s ex ante effect on executive power.

Another possible source of error is that scholars imagine that “neutral” advice will almost always prevent the president from engaging in preferred actions, while rarely enabling the president to engage in preferred actions. The implicit picture here is that a president will normally want to break the law, that under the proper interpretation of the Constitution and relevant standards the president can accomplish very little. So if OLC is in fact neutral and the president does obey its advice, then it must constrain the president.

But this theory cannot be right, either. If OLC constantly told the president that he cannot do what he wants to do, when in fact Congress and other agents would not object to the preferred actions, then the president would stop asking OLC for advice. As noted above, for OLC to maintain its relevance, it cannot offer an abstract interpretation of the Constitution that is divorced from political realities; it has to be able to make realistic predictions as to how other legal agents will react to the president’s actions. This has led OLC to develop a pro-executive jurisprudence in line with the long-term evolution of executive power. If OLC tried to impose constraints other than those imposed by Congress and other institutions with political power, then the president would ignore it.

---

Morrison, Libya, supra note \_\_ at 67-68. Still, the president’s freedom to deny Congress OLC’s opinion creates some noise in the system, as it is always possible that OLC failed to give advice rather than gave negative advice, and all this works to the executive’s advantage.

<sup>25</sup> See Goldsmith, supra note \_\_.



## C. Evidence

### 1. Testing the Three Hypotheses

We have three hypotheses about OLC on the table. The first is that OLC is an ex ante constraint on presidential power, serving a role similar to that of Congress and the courts. The second is that OLC is an ex ante enabler of presidential power. The third hypothesis is Ackerman's rubber-stamp theory that OLC serves neither as a constraint nor as an enabler because it cannot say no ex post. In this section, I will briefly discuss the evidence.

It is easy enough to distinguish Ackerman's hypothesis from the other two: if OLC never or rarely says no, then Ackerman is right. In addition, Ackerman is right even if OLC sometimes says no but the president ignores OLC in those cases.

Distinguishing the constraint and enabler hypotheses is more difficult. Both hypotheses predict some ex post no's. To distinguish the hypotheses, one would need to look at the other side of the ledger: the cases where OLC has enabled the president to act where otherwise Congress would have opposed him. Unfortunately, it would be hard to identify such cases.

### 2. Statistical Evidence

In a study of the written opinions of OLC, Trevor Morrison found that 79 percent approved the president's position, 8 percent provided a mixed answer, and 13 percent disapproved the president's position.<sup>26</sup> In several cases, OLC rejected the White House position on issues of significance. In addition, Morrison notes that since OLC usually provides negative advice orally, the written record reflects a selection bias in favor of approvals.<sup>27</sup>

But there is less here than meets the eye. First, one must keep in mind that the executive is a "they," not an "it." When the president cannot resolve policy differences among his major advisers, he may well be indifferent about OLC's reaction and indeed welcome a legal resolution ("sorry, my hands are tied"). Second, the relevant focus, for the purpose of my argument, is OLC advice on national security issues. On this topic, the consensus appears to be that OLC has said no to the executive in only four cases in its entire history aside from matters that remain classified: the rejection of the Bush administration's argument that the Geneva Conventions do not apply to terrorists in Iraq in 2002;<sup>28</sup> the rejection of certain forms of coercive interrogation in 2003; rejection of electronic surveillance that circumvented the FISA court in 2003; and rejection of the Libya intervention in 2011.<sup>29</sup>

---

<sup>26</sup> Id. at 1717-18.

<sup>27</sup> Id. at 1719.

<sup>28</sup> Goldsmith, *The Terror Presidency*, supra note \_\_ at 39-42.

<sup>29</sup> Former OLC officials report that OLC has on numerous occasions provided a classified no, which the president has complied with. See, e.g., Morrison, *Constitutional Alarmism*, supra note \_\_ at 1718. It is impossible to argue with someone who cites secret evidence. Without doubting their sincerity, one can question whether they know the complete story, or have thought about the evidence systematically and considered alternate hypotheses. In any event, dependent as I am on public sources, my argument will proceed accordingly.

Even these cases turn out to be ambiguous. It must be recalled that OLC first said “yes” on coercive interrogation and electronic surveillance, and then changed its mind a few years later. In addition, OLC’s “no” on coercive interrogation turned out to be less than absolute: it continued to authorize waterboarding even after the earlier memorandum was withdrawn. Unfortunately, evaluating the empirical evidence is even harder than Morrison indicates. The problem is not just that negative advice is confidential; the problem is that we do not know how the executive responded to this negative advice. Did it desist from its conduct? Modify it along the margins? Or ignore OLC? Maybe, maybe not.

A further methodological problem concerns whether a “no” blocks an important policy or simply requires certain i’s to be dotted or t’s to be crossed. OLC officials often emphasize that their job is to help the White House find a legally acceptable method of accomplishing their aims. Even the early Bush administration OLC drew the line on certain forms of torture (such as mock executions, the use of insects to exploit fears, etc.) and established guidelines to ensure the safety of detainees. The problem with treating this advice as a “no” is that it is not clear that the executive cared about these details, as opposed to the broad agenda of using coercive interrogation practices. It no doubt wanted legal advice so as to minimize the risk of legal liability.

Finally, as we have seen, President Obama ignored OLC’s position on the Libya intervention. So in that case, OLC took a brave stand and then discovered that it had been pushed to the sidelines. This major event offered unusually rapid confirmation of Ackerman’s claim that the executive can avoid negative advice from OLC by soliciting advice from the White House Counsel’s Office. (Obama also received favorable advice from the State Department legal counsel.) Morrison argued prior to this event that the president faces strong disincentives to end-running OLC.<sup>30</sup> Afterwards, he could only criticize the president, claim he suffered from negative political fallout, and hope that this sort of thing does not happen too often.<sup>31</sup> However, while the president was criticized, there is simply no evidence that his evasion of OLC has hurt him politically. As is so often case, the (apparent) success of the operation provides its own justification.

The upshot is that there is some evidence that OLC serves as an ex post constraint, but it is fairly weak. Ackerman’s hypothesis seems too extreme, but it is hard to distinguish between the constraint and enabler hypothesis. It is possible that OLC serves as a weak constraint or a weak enabler.

Why has it been so weak? First, it may turn out that the constellation of factors that drive decisionmaking in the executive branch prevents the president from solving a time-inconsistency problem by using OLC. The president benefits from neutral advice, and from being able to cite OLC’s approval, but when OLC blocks the president, short-term political considerations trump the medium-term advantages of maintaining a neutral OLC. Meanwhile, OLC’s lawyers yield to political pressure either for careerist reasons or in order to prevent the president from cutting OLC out of the process. Private lawyers face similar pressures, but the market in legal services might provide some additional discipline.

---

<sup>30</sup> Morrison, *Constitutional Alarmism*, supra note \_\_ at 1741.

<sup>31</sup> Morrison, *Libya*, supra note \_\_.

Second, the problem might lie in the nature of foreign relations and national security, an area of action that has been notoriously difficult to bring under legal control. Courts have frequently been asked to adjudicate disputes between Congress and the president in the area of national security. Generally speaking, they have resisted these requests, treating these issues as political questions or nonjusticiable for other reasons. The usual explanation for this resistance is that courts are not experts on these issues; that the highly fluid, frequently changing nature of foreign relations and national security makes them unsuitable for judicial resolution, which is rule-bound, public, decentralized, and slow; and that, accordingly, courts fear that if they intervene, their rulings will be ignored by the executive branch, provoking a constitutional crisis.

The supposed solution to this problem is to ask an advisory office in the executive branch to take over a function that the courts have repudiated. It is true that a small office in the executive branch can overcome certain problems that courts face relating to secrecy and speed. But the fundamental problem is that foreign relations are not susceptible to regulation by rules.<sup>32</sup>

### 3. A Case Study: Military Intervention without Congressional Authorization

Given the inconclusive nature of the statistical evidence, one might also consider the evidence in a qualitative fashion. In this section, I undertake such an analysis, focusing on military intervention.

The executive has on a number of occasions sought to send military forces into foreign countries without congressional consent. A lively controversy exists over whether the president has such authority. The U.S. Constitution gives Congress the power to declare war. Yet founding era sources suggest that opinion at that time was that the president could unilaterally use force in certain circumstances—for example, to repel invasions. In the following centuries, the executive has used force on foreign territory (rather than to repel invasions) on numerous occasions without congressional authorization, which gave rise to the view within the executive branch that tradition sanctioned the unilateral use of force even in foreign countries, albeit subject to ill-defined limits. After the Vietnam War, which was widely blamed on the executive despite congressional acquiescence, Congress passed the War Powers Act over the president's veto, which required the president to withdraw troops from hostilities within 60 days unless it received congressional authorization.

OLC fought off these twin constraints on executive power. In 1991, President George H.W. Bush ordered American troops into Somalia where they engaged in combat with local militias. OLC resolved the constitutional question by arguing that the executive has constitutional authority to send troops onto foreign soil in order to protect Americans and American property.<sup>33</sup> In 1994, President Clinton prepared to launch a military invasion of Haiti after a coup overthrew the government, but the new government of Haiti backed down, and American troops entered Haitian territory to conduct peacekeeping operations. President Clinton did not have congressional authorization for the transfer of American troops onto potentially hostile soil. However, OLC argued that the deployment of troops accorded with an appropriations bill that barred the use of appropriated funds for military operations in Haiti

---

<sup>32</sup> This is a major theme of Eric A. Posner and Adrian Vermeule, *The Executive Unbound* (2010).

<sup>33</sup> Authority to Use United States Military Forces in Somalia, 16 Op. Off. Legal Counsel 8 (1992).

unless justified by U.S. national security interests.<sup>34</sup> The appropriations bill did not by its terms authorize anything. OLC further explained that the president did not need congressional authorization under the Declaration of War clause when “the deployment [takes place] with the full consent of the legitimate government of the country involved.”<sup>35</sup> Such an event is not a “war” even if it could quickly turn into war. In addition, the War Powers Resolution does not apply “where the risk of sustained military conflict [is] negligible.”<sup>36</sup>

In 1995, President Clinton decided that U.S. forces should enter Bosnia and Herzegovina to enforce a fragile peace agreement. OLC found itself unable to rely on an appropriations bill. Instead of citing a statute, OLC noted that the president has the “power to deploy troops abroad without the initiation of hostilities,” citing historical practice and the president’s Commander in Chief power, the much criticized constitutional basis for many Bush-era OLC opinions.<sup>37</sup> In this case the risk of sustained military conflict was not “negligible.” But that no longer mattered. Because the parties had consented to the deployment of troops, there is still no “war” and neither the Declaration of War clause nor the War Powers Resolution applied.

In 1999, President Clinton ordered a massive air bombardment of Serbia. Congress again refused authorization; indeed, the bill to authorize military operations was voted on but failed to pass on a tie vote. It was impossible to argue that the risk of sustained military conflict was negligible and that the Serbs consented to the bombardment of their own country. OLC rested its case on an appropriations statute enacted after the commencement of hostilities.<sup>38</sup> President Clinton sent American troops into action and then dared Congress to deny them funding. Trapped, Congress reluctantly authorized funds. For OLC, the War Powers Resolution did not stand in the way of the war because of the appropriations statute even though the War Powers Resolution said that appropriations statutes do not count as congressional authorization.

During the George W. Bush administration, OLC took aggressive positions on a range of issues, including the use of coercive interrogation (despite a statute that banned torture) and warrantless surveillance (despite a statute that restricted surveillance).<sup>39</sup> OLC opinions relied heavily on the constitutional authority of the executive, using it to justify narrow interpretations of the statutes. Subsequently, OLC withdrew these memos.

Let us now turn to the Libya intervention. In 2011, President Obama ordered U.S. forces to participate in a NATO bombardment of Libya. Again, Congress refused to authorize the action. OLC advised the president that he could intervene without congressional authorization, citing its earlier opinions on military intervention.<sup>40</sup> Two months later, in response to questions

---

<sup>34</sup> Deployment of United States Armed Forces into Haiti, 18 Op. Off. Legal Counsel 173 (1994).

<sup>35</sup> Id. at 177.

<sup>36</sup> Id. at 176.

<sup>37</sup> Proposed Deployment of Troops into Bosnia, 19 Op. Off. Legal Counsel 327 (1995).

<sup>38</sup> Authorization for Continuing Hostilities in Kosovo, 24 Op. Off. Legal Counsel 327 (2000).

<sup>39</sup> Memorandum from Jay Bybee, Assistant Att’y Gen., Off. Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A (Aug. 1, 2002); Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Off. Legal Counsel, to David S. Kris, Associate Deputy Att’y Gen., Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the “Purpose” Standard for Searches (Sept. 25, 2001).

<sup>40</sup> See Off. Legal Counsel, Authority to Use Military Force in Libya, 35 Op. Off. Legal Counsel 1 (April 1, 2001).

as to whether the intervention complied with the War Powers Act's 60-day limit, the White House released a document to Congress with a one-page legal analysis. Consistent with previous OLC doctrine, the president argued that "the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad."<sup>41</sup> In addition, the president argued that the War Powers Resolution did not require congressional authorization because the action in Libya was not really a "war":

U.S. military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.<sup>42</sup>

The narrow definition of "hostilities" echoed the narrow definition of "torture" used by the Bush-era OLC. The reliance on UN Security Council authorization echoed Truman's reliance on Security Council authorization for the U.S. military intervention in Korea (also not authorized by Congress).<sup>43</sup>

Press reports later revealed that OLC had refused to issue an opinion advising the president that the use of military force in Libya was consistent with the War Powers Act, and that the president instead relied on the advice of the State Department legal adviser and the White House Counsel.<sup>44</sup>

What are we to make of this history? One view is that it confirms the rubber-stamp hypothesis. OLC has always rubber stamped legal interventions up until 2011; when it declined to do so, the White House ignored it.

However, the rubber-stamp hypothesis raises some questions. One is why OLC would go to such elaborate lengths to provide narrow justifications for military interventions in the early years; and why it would finally draw the line on Libya. It seems likely that OLC sought to prevent its credibility from eroding completely. An OLC which is truly a rubber stamp would be of no value to the president and might as well be dispensed of completely.

At the same time, OLC could not in the end constrain the executive from maintaining the military intervention in Libya. So if it preserved its credibility by rendering a "no," it could not

---

<sup>41</sup> White House Admin., United States Activities in Libya 25 (2011), available at <http://info.publicintelligence.net/ObamaLibyaJustification.pdf>.

<sup>42</sup> Id.

<sup>43</sup> See S.C. Res. 82, U.N. SCOR, 5th Sess., 473rd mtg., U.N. Doc. S/INF/4/Rev.1 at 4 (June 25, 1950); S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg., U.N. Doc. S/INF/4/Rev. 1 at 5 (June 27, 1950).

<sup>44</sup> See Charlie Savage, 2 Top Lawyers Lost to Obama in Libya War Policy Debate, N.Y. Times, June 17, 2011, <http://www.nytimes.com/2011/06/18/world/africa/18powers.html>.

provide the checking function of Congress and the judiciary. The president's decision to disregard OLC's advice is more in the spirit of the enabler hypothesis than the constraint hypothesis: the president made what one hopes was a rational decision to weaken his hand with Congress in future confrontations because he believed that the stakes were too high in the Libya intervention to withdraw the troops. The gamble may well have paid off. The president's success in Libya in the face of congressional opposition may have the long-term effect of eroding the War Powers Act rather than weaken the executive; in that case, the Obama acted wisely by overruling OLC.

#### D. Alternatives

Despairing of both the traditional external checks on the executive (as intended by Madison) and internal checks on the executive (as advocated by Goldsmith), Ackerman suggests the creation of an executive tribunal that would have the power to review presidential assertions of power and restrict such assertions when unlawful.<sup>45</sup> Neal Katyal proposed vesting OLC's quasi-judicial authority in an executive branch official who enjoys more independence than the OLC head currently possesses.<sup>46</sup> However, neither approach solves the underlying problem that has resulted in executive discretion. Because unanticipated national security emergencies call for powers that cannot be stipulated in advance, the executive's actions at such times are not susceptible to traditional rule-bound legal analysis. Therefore, either the external official or tribunal will honestly apply the law and end up interfering with policies needed to protect national security, or he (or it) will enjoy *de facto* policymaking authority, which will not be regarded as legitimate in a political appointee.

#### Conclusion

The medical protocol analogy does not provide any reason for doubting the deference thesis. Rules are valuable in many settings, including emergencies; but it does not follow from that observation that courts and legislatures rather than the executive should create and enforce the rules. Each institution has specific advantages; the executive's advantages are salient during emergencies.

The notion that the executive can be constrained by its own components is a paradoxical idea, and has little to recommend it. In the end, someone must have discretion to respond to unforeseen events, and in the U.S. system that role has been given to the president. The theory that OLC or some similar office within the executive branch could constrain the president rests on a confusion between rational self-binding, which presidents may (albeit with difficulty) engage in, and external constraint, which presidents resist. OLC may serve as a device for rational self-binding, which extends the executive power; it is highly unlikely, however, that it can serve as a constraint.

---

<sup>45</sup> Ackerman, *supra* note \_\_\_\_.

<sup>46</sup> Katyal, *supra* note \_\_\_\_ at 2338.

Readers with comments may address them to:

Professor Eric A. Posner  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
[eric\\_posner@law.uchicago.edu](mailto:eric_posner@law.uchicago.edu)

**The University of Chicago Law School**  
**Public Law and Legal Theory Working Paper Series**

For a listing of papers 1–345 please go to <http://www.law.uchicago.edu/publications/papers/publiclaw>.

- 346. Rosalind Dixon and Richard Holden, Constitutional Amendment Rules: The Denominator Problem, May 2011
- 347. Rosalind Dixon, Constitutional Amendment Rules: A Comparative Perspective, May 2011
- 348. Rosalind Dixon, Weak-Form Judicial Review and American Exceptionalism, May 2011
- 349. Rosalind Dixon, Transnational Constitutionalism and Unconstitutional Constitutional Amendments, May 2011
- 350. Adam B. Cox and Richard T. Holden, Reconsidering Racial and Partisan Gerrymandering, May 2011
- 351. Brian Leiter, The Circumstances of Civility, May 2011
- 352. Brian Leiter, Naturalized Jurisprudence and American Legal Realism Revisited, May 2011
- 353. Lee Anne Fennell, Property and Precaution, June 2011
- 354. Alon Harel and Ariel Porat, Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics, June 2011
- 355. Bernard E. Harcourt, Radical Thought from Marx, Nietzsche, and Freud, through Foucault, to the Present: Comments on Steven Lukes' "In Defense of False Consciousness," June 2011
- 356. Alison L. LaCroix, Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood, July 2011
- 357. Martha C. Nussbaum, Teaching Patriotism: Love and Critical Reform, July 2011
- 358. Shai Dothan, Judicial Tactics in the European Court of Human Rights, August 2011
- 359. Jonathan S. Masur and Eric A. Posner, Regulation, Unemployment, and Cost-Benefit Analysis, August, 2011
- 360. Adam B. Cox and Eric A. Posner, Delegation in Immigration Law, September 2011
- 361. José Antonio Cheibub, Zachary Elkins, and Tom Ginsburg, Latin American Presidentialism in Comparative and Historical Perspective, September 2011
- 362. Tom Ginsburg and Rosalind Dixon, Comparative Constitutional Law: Introduction, September 2011
- 363. Eric A. Posner, Deference to the Executive in the United States after 9/11: Congress, the Courts, and the Office of Legal Counsel, September 2011